Supreme Court, U.S.
FILED

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No._____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

Martin H. Tonn,
Petitioner, Pro-Se

v.

Jack Forsberg;
Donald G. Russell;
Judith Screaton;
Joseph D. Wyssmann;
United States of America,
Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for
the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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1014

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit, has erred, by extending its holding in Vennes (limited to tax assessment and collection activity) to Tonn v. Forsberg et al, (a due process claim) thereby depriving Tonn of a Bivens type remedy for unconstitutional activity of government employees acting outside of the scope of their employment and responsibility for which there is no statutorial remedy except for the remedy created by the Court in Bivens.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED - - - - - - -	i
TABLE OF CONTENTS - - - - - - - -	ii
TABLE OF AUTHORITIES - - - - - - -	iii
PETITION - - - - - - - - - - - -	1
OPINIONS BELOW - - - - - - - - - -	2
JURISDICTION - - - - - - - - - -	2
CONSTITUTIONAL PROVISION INVOLVED - - - - - - - - - - - -	2
STATEMENT - - - - - - - - - - - -	3
REASONS FOR GRANTING THE PETITION - - - - - - - - - - -	4
THE QUESTION PRESENTED IS IMPORTANT - - - - - - - - - - -	5
CONCLUSION - - - - - - - - - - -	5
APPENDIX	
Circuit Court Order denying rehearing - - - - - - - - - -A-00	
Circuit Court Opinion	A-01 - A-02
District Court Opinion	A-1 - A-43
Petitioner's Complaint	A-45 - A-94

TABLE OF AUTHORITIES Pages

Cases

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. CT. 1999, 29 L.Ed.2d 619(1971) - - - - - - - - - - - i

Tonn v. United States, 847 F. Supp. 711, 716-18 (D. Minn. 1993) - - - - - - - - - - - - - - i

Vennes v. An Unknown Number of Unidentified agents of United States, No. 93-1737, 1994 WL 261805, at *5-6 (8th Cir. June 16, 1994). - - - - - - - - i

Constitution

Fifth Amendment to the United States Constitution 2-5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

- - - - - - - - - - - - -

Martin H. Tonn
Petitioner, Pro Se

v.

Jack Forsberg
Donald G. Russell
Judith Screaton
Joseph D. Wyssmann
United States of America
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Martin H. Tonn, respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The PER CURIAM opinion of the United States Court of Appeals for the Eighth Circuit (App., infra, A-01 - A-02) Filed: July 11, 1994. The United States District Court District of Minnesota Third Division Civil No. 3-93-385 MEMORANDUM OPINION AND ORDER (App., infra A-1 - A-43) Dated: November 30, 1993

JURISDICTION

The court of appeals entered its judgement on July 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment states,"No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

STATEMENT

This case involves deprivation of Tonn's Fifth Amendment Constitutional right of due process of law leading to the loss of his property and business.

In this case individual IRS employees interfered with the contractual relation-ship between the petitioner, Martin Tonn, and his partners/investors (such activity being outside the scope of the IRS employment and responsibility). They then refused to permit timely, meaningful and detailed discussion of the erroneous charges and issues raised by the IRS. It is this refusal by the IRS employees to permit timely meaningful and detailed discussion that has caused and further aggravated the loss of Tonn's property and business without due process of law, constituting a fifth amendment violation.

REASONS FOR GRANTING THE PETITION

1. The Eighth Circuit Court of Appeals has failed to recognize that Tonn's complaint (App., A-45 to A-94) alleges a constitutional claim clearly distinguishable from that of a tax assessment and collection activity. The wrong of which Tonn has complained is that Forsberg et al by various manner and means prevented Tonn from presenting in detail a defense to erroneous issues raised by the IRS, thereby causing the loss of Tonn's property and business. (a due process violation)

2. By reclassifying Tonn's constitutional claim (a due process violation) as a Bivens claim for tax assessment and collection the Court has deprived Tonn a remedy for his loss of property and business.

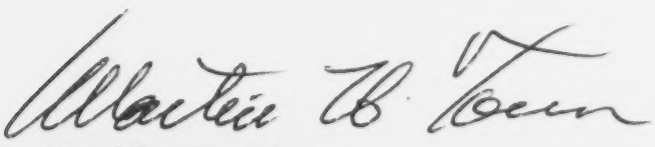
THE QUESTION PRESENTED IS IMPORTANT

The Circuit Court holding in Tonn v. Forsberg et al if permitted to stand will authorize unlimited abuse of the citizenry by government employees, acting outside the scope of their employment and responsibility by creating unlimited and absolute immunity for IRS employees regardless of the outrageous, egregious and unconstitutional nature of their activity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

Denial of Petition for rehearing by

U. S. Court of Appeals

For the Eighth Circuit

Filed August 26, 1994

Page A-00

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 94-1082MNST

FILED
Aug 26 1994
Michael Gans
Clerk of Court

Martin H. Tonn, Appellant,	* Order Denying
	* Petition for
	* Rehearing and
vs.	* Suggestion for
	* Rehearing En
Jack Forsberg, et al., Appellees.	* Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 26, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX

Per Curiam Opinion Of The

U.S. Court Of Appeals

For The Eighth Circuit

Dated July 11, 1994

Pages A-01 - A-02

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1082MN

Martin H. Tonn,

Appellant,

v.

Jack Forsberg; Donald G. Russell; Judith Screaton; Joseph D. Wyssmann; United States of America,

Appellees,

Appeal from the United States District Court for the District of Minnesota.

(PUBLISHED)

Submitted: July 5, 1994

Filed: July 11,1994

Before FAGG, WOLLMAN, AND MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Martin H. Tonn appeals the district court's dismissal of Tonn's Bivens v. Six Unknown Named Agents of Fed. Bureau

of Narcotics, 403 U.S. 388 (1971) action against Internal Revenue Service (IRS) employees who audited partnerships in which Tonn held financial interest. See Tonn v. United States, 847 F. Supp. 711, 716-18 (D. Minn. 1993). Tonn contends that Bivens provides a remedy for taxpayers against IRS employees for their tax assessment and collection activities. Tonn's contention, however, is foreclosed by this court's contrary holding in Vennes v. An Unknown Number of Unidentified agents of United States, No. 93-1737, 1994 WL 261805, at *5-6 (8th Cir. June 16, 1994). We thus affirm the district court. See 8th Cir. R. 47B.

APPENDIX

Memorandum Opinion And Order

Civil No. 3-93-385

U.S. District Court District Of

Minnesota Third Division

Dated November 30, 1993

Pages A-1 - A-43

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

Civil No. 3-93-385

MEMORANDUM OPINON AND ORDER

Martin H. Tonn

Plaintiff,

vs.

United States of America,

Jack Forsberg,

Donald G. Russell,

Judith Screaton, and

Joseph D. Wyssmann,

Defendants.

Martin H. Tonn, pro se, for plaintiff.

Tamera Fine-Trail, United States Department of Justice, for defendants.

INTRODUCTION

Plaintiff Martin H. Tonn commenced this action against the individual defendants Jack Forsberg, Donald G. Russell, Judith Screaton, and Joseph

D. Wyssmann; Tonn alleges that the defendants, all of whom are or were employees of the Internal Revenue Service ("IRS"), committed various common law torts and violated his right to due process under the Fifth Amendment to the United States Constitution in connection with a tax dispute. Before the Court is Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b) (1) and (6).

BACKGROUND

The following "facts" are assumed to be true for the purposes of the instant motion.

The Parties

*2 Tonn is an individual who resides in the State of Minnesota.

The individual defendants were, at all times relevant to this action, employees of the IRS. Defendant Jack Forsberg was District Counsel for the IRS; defendant Donald G. Russell

was an IRS Appraiser; defendant Judith Screaton was an IRS Appeals officer; and defendant Donald G. Russell was an IRS Revenue Agent.

The origins of the dispute

During the 1970's and early 1980's, Tonn and other individuals designed, developed, and manufactured prototype alternative energy equipment ("Equipment") designed to act as an alternative energy source to fossil fuels. Between 1981 and 1983, Tonn sold all of his interests in the Equipment to the Laurington Corporation ("Laurington"), of which he was the sole owner

During 1981, 1982, and 1983, certain pieces of the Equipment were sold to three limited partnerships Tonn created (the "Partnerships");_/1 the partnerships were formed to demonstrate, market, and operate the Equipment, as well as manufacture similar alternative energy

devices. Tonn also organized Independent Energy Systems, INC. ("IES") to serve as the general partner of the Partnerships._/2 In 1983, Tonn, through Interstate Energy Enterprises, INC. ("IEEI") leased, and eventually purchased,

- - - - - - Footnotes- - - - - -

n1 The three partnerships were (1) Laurington Energy Properties, (2) Independent Energy Properties I, and (3) Independent Energy Properties II.

n2 Tonn owned 49% of IES.

- - - - - - End Footnote - - - - -

*3 a manufacturing facility in Wisconsin for purposes of manufacturing the Equipment for sale and lease.

The Partnerships' Tax Dispute

In early 1985 the IRS began an audit of the Partnerships and the limited partners. When the audit was commenced, the limited partners' payments to the Partnerships were halted until the IRS

investigation could be resolved. Due to the Partnerships' inability to collect funds from the partners, IEEI was forced to file for Chapter 11 bankruptcy protection in March of 1986. In March of 1987, IEEI's bankruptcy petition was dismissed on motion by the IRS for unpaid withholding taxes. After the dismissal of the bankruptcy petition, the IRS levied against and seized IEEI's assets and records; eventually, IEEI shut down.

At the end of its audit and investigation, the IRS determined that the value of the Partnerships' depreciable property had been overstated. The IRS also disallowed certain tax credits taken by the Partnerships and the partners.

The Partnerships appealed the findings of the IRS audit to the regional IRS Appeals office._/3

- - - - - - - Footnote - - - - - - -

n3 The Complaint states that Tonn

first received access to IRS appraisal and Defendant Russell's reports in May of 1987. Tonn claims that those reports contained false information and relied upon a flawed methodology. Tonn addressed the purported problems during a July 20, 1989 Appeals Conference with defendant Screaton. Tonn alleges that in an October 2, 1989 internal memorandum to Screaton, Russell attempted to cover the errors in his reports by blaming the Partnerships' certified public accountant for any erroneous calculations. Tonn further alleges that in an April 21, 1989 letter to the limited partners, Screaton suggested that the limited partners take legal action against Tonn.

- - - - -End Footnote- - - - - - - -

During a July 20, 1989 Appeals Conference between representatives of the

Partnerships *4 and Screaton, Screaton raised a new issue: the "not for profit intent" of Partnerships. At a November 15, 1989 Appeals Conference, the Partnerships were prepared to defend the "not for profit intent" character of the enterprise; however, Screaton stated that she would not change her mind about that issue. The Partnership did not have an opportunity to present or discuss their position in detail.

On December 20, 1988 Henry A. Wall and Lavina Wall (the "Walls"), limited partners in one of the Partnerships, petitioned the United States Tax Court for a redetermination of the IRS's calculation of the permissible deductions._/4 On February 28, 1990 Forsberg informed the Walls that their case was scheduled for the April 30, 1990 docket. On March 15, 1990 Henry Wall informed Tonn _/5 that the

University of Minnesota Law School Clinic had reconsidered its earlier decision to assist the Walls in their Tax Court case; Wall stated that Forsberg allegedly had told the Clinic supervisor that the case was too complicated for students.

- - - - -Footnotes- - - - - -

n4 "Wall v. Commissioner of Internal Revenue, Docket No. 3278888S [hereinafter Wall].

n5 Although Tonn was not a party in Wall, he was involved in the dispute before the Tax Court.

- - - - -End Footnote- - - - - - - -

On March 23, and 28, 1990, Tonn, Wall and other persons met with Forsberg to inquire about the positions the IRS intended to take before the Tax Court in Wall. Although they requested that Forsberg state the reasons in writing, Forsberg did not comply with that request

until April 6, 1990. Then during an April 9, *5 1990 meeting between Forsberg, Tonn, and certain investors, Forsberg told the investors that "Tonn was no better as a tax advisor than he was a securities advisor."

In Wall, Forsberg submitted a Respondents Brief in Answer. In that Brief, Forsberg (1) incorrectly relied on inapposite precedent, (2) based his arguments on the improper sections of the Internal Revenue Code, and (3) misquoted and took out of context certain court opinions. Forsberg also argued, for the first time, that certain deductions and allowances should not be available for the year 1982 because the Equipment was not "placed in service" during the taxable year.

On December 10, 1991 the Tax Court_/6 ruled in favor of the IRS on the availability of tax credits for

the year 1982, concluding that the equipment had not been placed "in service" in 1982.

- - - - - -Footnote- - - - - - - -

n6 62 T.C.M. (CCH) 1425 (T.C. Dec. 10, 1991), on reconsideration, 63 T.C.M. 3102 (T.C. June 8, 1992), motion for reconsideration denied.

n7 63 T.C.M. 3102 (T.C. June 8, 1992).

- - - - - - -End Footnote- - - - - - -

On February 25, 1992 the Walls filed a Motion for Reconsideration; on June 8, 1992 the Tax Court issued a Supplementary Memorandum Opinion_/7 reaffirming its determination regarding the 1982 taxable year. However, the Tax Court now concluded that the Equipment was not "in service" in 1982 because a trade or business did not exist during the taxable year -- a new and different rationale raised sua sponte

by the Tax Court. Wall filed a Motion for Reconsideration of the Supplementary Memorandum and Opinion on July 10, 1992; on December 13, 1992, *6 Tonn learned that the Tax Court had denied the Motion on July 14, 1992. Because the appeal period had closed by December of 1992, the Walls could not appeal the Tax Court's decision. Thereafter, the Partnerships settled the dispute on the terms proposed by the IRS.

Tonn's Tax Dispute

During the investigation, certain penalties were assessed against Tonn, pursuant to 26 U.S.C. § 6703, for promoting an "abusive tax shelter" and submitting overvalued gross valuation statements. Tonn's claim for an adjustment to those penalties was disallowed on April 30, 1990. At the end of 1992, Tonn filed an action with the United States Court of Claims

regarding those penalties. On the United States' Motion to dismiss the appeal on the ground that the court of Claims lacked Jurisdiction, Tonn's action was dismissed for want of jurisdiction.

Thereafter, Tonn asked United States Senator Paul Wellstone (MN) to review certain allegedly conflicting IRS documents. Following an inquiry by Senator Wellstone's office, the IRS reconsidered its postion and met with Tonn on December 3, 1992 to discuss the penalties. On March 29, 1993 the IRS informed Tonn that it was abating all section 6703 penalties against him for taxable years 1982 and 1983.

Tonn filed this action on June 14, 1993. The Complaint alleges four causes of action: Count I -- Fraud;_/8 Count II-- *7 Misrepresentation of Fact;_/9 Count III -- Defamation;_/10 and Count IV -- Deprivation of Fifth

Amendment Constitutional Rights of Due Process._/11

- - - - - - - - Footnote- - - - - -

n8 In Count I, Tonn claims that (1) in June of 1988, Wyssmann made fraudulent representations to certain partners and investors that Tonn had misappropriated funds of the Partnerships' for personal use; (2) in 1985, Wyssmann made representations to partners and investors that credits relating to the Equipment, which the partners had taken as deductions on their income tax, would not be allowed; (3) from 1986 through 1990 (a) Russell, in his original Appraisal, (b) Screaton, by refusing to acknowledge certain statements, and (c) Forsberg, by his submission of Respondent's Expert Witness Report, fraudulently misrepresented their comparable example of Fair Market Valuation comparison,

understated at a ratio of 20:1; (4) Russell fraudulently attempted to deceive Tonn by placing blame for his own errors on the Partnerships' accountant; and (5) Forsberg's Respondent's Brief in Answer, submitted to the Tax Court in Wall fraudulently took out of context and misrepresented certain judicial opinions.

n9 In Count II, Tonn alleges that (1) Russell attempted to hide his erroneous tax valuation metholology by blaming his shoddy work on the Partnerships' accountant; (2) Screaton stated that even if there were problems with the IRS' audit/appraisal, alternative issues would be raised at trial; (3) Russell improperly calculated the interest rate of certain investments held by the Partnerships; (4) Russell and another IRS Appraiser misrepresented their erroneous

appraisal of certain equipment as fact, which Screaton relied upon and which Forsberg put before the Tax Court in his "Respondent's Expert Witness Report."

n10 In Count III, Tonn alleges that (1) during his 1985 audit investigation, Wyssmann made false statements to partners and investors that Tonn was using partnership funds for his own use; (2) during an April 9, 1990 meeting with Forsberg concerning the trial in Wall, Forsberg (a) told Tonn, in the presence of other investors, (i) "you don't know what you are talking about," and (ii) "you are not qualified to speak on these issues; and (b) told the other investors that they should get someone else to advise them because Tonn didn't know any more about tax law than he did about securities law; and (3)

in an April 21, 1989 letter, Screaton suggested that the partners commence legal action against Tonn.

n11 In Count IV, Tonn alleges that the following acts have deprived him of due process:

(a) false and erroneous statements made to investors asserting fraudulent actions by Tonn with respect to allocation of funds within the Partnerships;

(b) failing to provide a timely notice to Tonn of false and erroneous allegations being made to the investors by the defendants, depriving Tonn of the right to protect and defend himself, his property, and his business;

(c) failing to provide a neutral decision-maker to rule on the veracity of the allegations before these action were taken;

d) denying Tonn's request for an opportunity to make a detailed oral presentation to the defendants during either the fact-finding portion of the investigation or the Appeals Conferences;

(e) denying Tonn an opportunity, during the audit, appeals process, and/or litigation process, to present evidence regarding the issues or witnesses to the investigative personnel or decision making agents regarding the allegations made against him; and

(f) failing to inform Tonn of the allegations being made against him, thereby denying him the opportunity to be represented by an attorney in defending false IRS allegations prior to the IRS levying and seizing his property.

- - - - -End Footnote- - - - -

On September 20, 1993, defendant United States of *8 America filed a Motion, pursuant to 28 U.S.C. §§ 2679(b) and (d) (1), for an order substituting it as the party defendant to Counts I, II, and III._/12 Although Tonn opposed that Motion, the court_/13 ordered the United States substituted as the defendant to Counts I-III;_/14 however, the court held that the individual defendants would remain in the action as defendants to Tonn's due process claim in Count IV. This Motion followed._/15

- - - - - - -Footnote- - - - - - -

n12 On September 27, 1993 the United States filed an Amended Motion for Substitution (Doc. NO. 13).

n13 See October 15, 1993 Order (Boline, M.J.) (Doc. No. 21).

n14 The Federal Employees Liability Reform and Tort Compensation

Act, 28 U.S.C. § 2679 (d) (1) provides that where an individual federal employee is a made a part defendant, the United States should be substituted as a defendant in place of that employee where the Attorney General certifies that the employee was acting within the scope of that employee's employment at the time that the incident giving rise to the claim occurred. Upon substitution, the action or proceeding is deemed to be one under the Federal Tort Claims Act ("FTCA"). Id. § 1346 (b).

n15 The United States filed a Motion to Dismiss on September 21, 1993 and an Amended Motion to Dismiss on September 30, 1993.

- - - - - - - -End Footnote- - - - - -

*9 **Discussion**

I. Counts I, II, and III

As discussed above, Count I, II,

and III of the Complaint allege common law tort claims; however, in his responsive memorandum (see Mem. Opp'n Mot. to Dismuss, at 1-2), and at the hearing on the instant motion, Tonn contended that his Complaint asserts only a due process claim. Thus, it is not clear whether Tonn has alleged four separate causes of action, or only one (in which case the claims in Counts I through III merely support his due process claim in Count IV).

Assuming that Tonn has alleged independent causes of action for fraud, misrepresentation, and defamation, those claims are not within this Court's subject matter jurisdiction. As noted above, Tonn's claims against the United States, although originally brought against individual employees of the IRS, are, as a result of the order of substitution,_/16 now deemed to have

arisen under the FTCA.

- - - - - - - Footnote- - - - - - -

n16 At page 6 of his responsive memorandum, Tonn takes issue with the propriety of the substitution as well as the certification that the individual defendants were acting within the scope of their employment during the incidents in question. To the extent that Tonn is contesting the propriety of the substitution order, his opposition is not supported by existing law or the record in this case.

- - - - - - - End Footnote- - - -

As such, Tonn's claims are subject to all of the limitations provided in the FTCA. See 28 U.S.C. § 2679 (d)(4). One of those limitations requires that a plaintiff exhaust his administrative remedies by first presenting his *10 claim_/17 to the appropriate federal

agency._/18 28 U.S.C. § 2675 (a). This presentment requirement is jurisdictional; it must be satisfied before this Court may exercise its jurisdiction over the claim. Bellecourt v. united States, 994 F.2d 427, 430 (8th Cir. 1993) (citing Melo v. United States, 505 F.2d. 1026, 1028-29 (8th Cir. 1974)

A review of the record in this case demonstrates that Tonn has failed to satisfy the FTCA's administrative claim requirement. There is no indication that Tonn has submitted a satisfactory claim to the IRS or any other agency in connection with the tort claims alleged in Counts I through III. Accordingly, if Counts I-III allege separate claims, this Count is without subject matter jurisdiction over them and they must be dismissed without prejudice._/19

- - - - - - -Footnote- - - - -

n17 A qualifying claim must include written notification of an incident and a claim for money damages, in a sum certain, for injury alleged to have occurred by reason of the incident. 28 C.F.R. § 14.2(a); see Pan Tech Mgmt. v. HUD, 788 F. Supp. 152, 154 (E.D.N.Y. 1992).

n18 28 U.S.C. § 2675 (a) provides in pertinent part:

> [a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have

first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

n19 The United States has made several arguments in support of dismissal on the merits. The Court has not assessed the reasonableness, if any, of those arguments.

- - - - - End Footnote- - - - - -

II. Count IV *11

Count IV of the Complaint is a Bivens /20 action alleging that the individual defendants violated Tonn's due process rights under the Fifth Amendment. The Government contends that Tonn's Bivens claim must be dismissed because (1) it fails to meet the heightened pleading requirement for a Bivens claim; (2) Congress has provided him with an

alternative, exclusive remedy; and (3) the individual defendants are immune from liability.

A. The Standard of Decision

When passing on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court accepts as true the material facts alleged in the Complaint and considers the allegation therein in the light most favorable to the nonmovant. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The court may dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."_/21

- - - - - -Footnote- - - - - - - -

n20 Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. CT.

1999, 29 L.Ed.2d 619 (1971). In Bivens, the Supreme Court helds that damages may be awarded where federal officers knowingly violate an individual's Fourth Amendment rights, if (1) the individual has no other remedy, and (2) there is no explicit Congressional declaration that persons injured by a federal officer's violation of the constitution may not recover money damages. In Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), the Supreme Court recognized a Bivens action arising under the Due Process Clause of the Fifth Amendment.

n21 In this case, certain of the parties have submitted materials outside of the pleadings and attachments thereto. Under Rule 12(b)(6), where matters outside the pleadings are not excluded by a court

when passing on a motion to dismiss, the motion is deemed to be one for summary judgment under Rule 56. The Court has excluded all submissions which would convert this motion to one for summary judgment.

- - - - - - -End Footnote- - - - - -

Hishon v. King & Spaulding, 467 U.S. 69, 73, *12 104 S. Ct. 2229, 2232, 81 L.Ed.2d 59 (1984); Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)

B. Sufficiency of the Allegations in Count IV

To satisfy applicable pleading requirements, a plaintiff alleging that his civil rights were violated must "at least set forth minimal facts, not subjective characterizations, as to who did what to whom and why." Kaylor v. Fields, 661 F.2d 1177, 1183 (8th Cir. 1981); see also Dewey v. University

of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982) (citing, inter alia, Anderson v. Sixth Judicial District Court 521 F.2d 420 (8th Cir. 1975), cert. denied, 461 U.S. 944, 103 S. Ct. 2121, 77 L.Ed.2d 1301 (1983). However, a complaint need not state each and every fact relevant to the claimed violation in order to satisfactorily plead a constitutional violation.

When measured against the standard set forth above, Tonn's Complaint satisfies all relevant pleading requirements. Contrary to the Government's view, Tonn's Complaint is not a "rambling, circuitous, largely incoherent diatribe," (see Mem. Supp. Mot. Dismiss, at 2); rather, it identifies specific acts which were allegedly taken by each named defendant and which allegedly violated Tonn's rights to due process. In other words,

the Complaint is more than a series of conclusory allegations devoid *13 of any factual basis._/22

- - - - - - - -Footnote- - - - - -

n22 Of course, that the Complaint satisfies Rule 8(a) does not mean that it will withstand the Government's remaining arguments in favor of dismissal.

- - - - - - End Footnote - - - - -

C. Extending Bivens Action to Violations by IRS Employees

The United States also seeks dismissal on a more fundamental ground: Bivens actions against IRS employees are not appropriate. The Government contends that the Code provides taxpayers with meaningful safeguards from or remedies for wrongful conduct of IRS agents. As a result, it continues, even though Congress has not specifically provided taxpayers with a statutory

right to recover money damages for constitutional violations by IRS employees, this Court should not extend a Bivens claim to Tonn. The Court agrees.

In Schweiker v. Chilicky, 487 U.S. 412, 108 S. CT. 2460, 101 L.Ed.2d 370 (1988), the Supreme Court, in reviewing the propriety of a Bivens action for constitutional violations by social security system employees, counseled that because "special factors counsel[] hesitation," there are circumstances under which a court-created damages remedy may not be appropriate, even where there is no statutory relief for a constitutional violation. Id. at 421, 108 S. Ct. at 2467. The court reasoned that

> "special factors counseling hesitation in the absence of affirmative action by Congress" has proved to be an appropriate

judicial deference to indications that congressional inaction has not been inadvertent. When the design of a governmental program suggests that Congress has provided what it considers to be adequate remedial mechanisms for constitutional violations that *14 may occur in the course of its administration, we have not created additional Bivens remedies.

Id. at 423, 108 S. Ct. at 2468. /23

- - - - - - Footnote- - - - - -

n23 In a decision issued prior six months prior to Scweiker, the court in Felak v. United States, 677 F. Supp. 606 (D. Minn. 1988), set forth three factors which make courts reluctant to expand the availability of Bivens actions: (1) the lack of an underlying constitutional claim; (2) the existence of explicit statutory

remedies; and (3) a risk that court-created remedies would interfere with the effective functioning of government. Id. at 607 (citations omitted).

- - - - - - End Footnote- - - - -

Applying this reasoning, the Schweiker Court proceeded to hold that, even though Congress had failed to provide a remedy in damages for constitutional violations by social security employees, a Bivens action was inappropriate since (1) the social security system contains elaborate mechanisms for the resolution of claims, and (2) Congress had given frequent attention to problems arising under the system. Id. at 425, 108 S. Ct. at 2468-69 (discussing Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L.Ed.2d 648 (1983) (Bivens action not appropriate in civil service system), and Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L.Ed.2d 586 (1983) (Bivens

action not appropriate in military justice system)).

The Court agrees with decisions (both pre- and post-dating Schweiker) holding that because the remedial scheme of the Code provides taxpayers with sufficient alternative means of challenging and correcting inappropriate conduct by IRS employees, it would be improper to recognize a Bivens action in situations where, as here, the alleged violations of the Fifth Amendment occurred in connection with IRS activities (whether *15 they concern the determination or collection of taxes). See Wages v. I.R.S., 915 F.2d 1230, 1235 (9th Cir. 1990) (post-Schweiker; plaintiff alleged that "fraudulent" acts of individual defendants violated Fifth Amendment due process rights), cert. denied, 498 U.S. 111 S. Ct. 986, 112 L.Ed.2d 1071

(1991); National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1247-48 (10th Cir 1989) (post-Schweiker); Hefti v. McGrath, 784 F. Supp. 1426, 1431, (W.D Mo. 1992) (post-Schweiker), amended (Mar. 31, 1992); Felak v. United States, 677 F. Supp. 606, 607-08 (D. Minn. 1988) (pre- Schweiker); see also McMillen v. United States Dept. of Treasury, 960 F.2d 187, 190 (1st Cir. 1991) (dicta); Cameron v. Commissioner, 773 F.2d 126, 129 (7th Cir. 1985)._/24 The Code provides taxpayers with the ability to fully litigate any liability or penalty determined by the IRS._/25

- - - - - Footnote- - - - - - - -

n24 In addition, certain of the acts allegedly done in violation of Tonn's Fifth Amendment rights are similar to the alleged violations at issue in Schweiker. Cf. Complaint, ¶¶ 45(c)-(e) and 487 U.S. at 420 n.2,

108 S. Ct. at 2466 n.2.

n25 The Code requires that the IRS provide a taxpayer with (1) notice before it takes his property, and (2) a choice whether to be heard before or after the deprivation. 26 U.S.C. § 6213 (a). Once the IRS determines that a taxpayer owes money, it must issue a notice of the deficiency, then wait 90 days before attempting to collect the taxes due. Id. § 6213(a). If the taxpayer wants a pre-deprivation hearing, he can, during those 90 days, file a petition with the Tax Court asking it to redetermine the deficiency; any collection efforts are stayed during the pendency of the petition. Id. Alternatively, the taxpayer can pay the deficiency, i.e., suffer the deprivation, and then seek a refund in a post-deprivation action in federal

district court. Id. § 7422.

- - - - -End Footnote- - - - - - - - -

This statutory scheme adequately protects a taxpayer's right to due process. Stonecipher v. Bray, 653 F.2d. 398, 401 (9th Cir. 1981), cert. denied, 454 U.S. 1145, 102 S. Ct. 1006, 71 L.Ed.2d 297 *16 (1982); see Gonsalves v. IRS, 986 F.2d 1407 (table), text reported at 1993 WL 48808 (1st Cir), cert. denied, __ U.S.__, 114 S. Ct. 151 (1993). In this case, Tonn and the partners of the Partnerships filed administrative appeals of various assessments and penalties, certain of the partners unsuccessfully sought to have the Tax Court redetermine the IRS's disallowance of their tax credits, and Tonn sought and was able to have the IRS abate his section 6700 penalties (albeit with the help a United States Senator).

In addition, the Code provides

taxpayers with remedies, judicial and otherwise, for correcting and redressing wrongful acts taken by IRS employees in connection with any collection activities. See e.g., 26 U.S.C. § 7433 (creating civil action for wrongs committed after December 31, 1988). Although these provisions do not provide taxpayers with an all-encompassing remedy for wrongful acts of IRS personnel, the rights established under the Code illustrate that it provides

> all sorts of rights against the overzealous officialdom, including, most fundamentally, the right to sue the government for a refund if forced to overpay taxes, and it would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against [IRS empplyees].

Cameron, 773 F.2d at 129; see Schweiker, 487 U.S. at 423, 108 S. Ct. at 2468. With such a panoply of rights already available, Congress, and not this Court should be the body charged with creating additional liabilities for IRS employees who violate a *17 taxpayer's constitutional rights._/26

- - - - - -Footnote- - - - - - -

n26 Moreover, the existence of a Bivens remedy against employees of the IRS would interfere with the functioning of government. Felak, 677 F. Supp. at 608. "To open up an entirely new avenue of relief resulting in the personal liability of [IRS] employees would serve to hamper the ability of such employees to perform a function that if a difficult one and one that is vital to our nation." Baddour, Inc. v. United States, 802 F.2d 801, 806 (5th Cir. 1986),

quoted in, Felak, 677 F. Supp. at 608.

- - - - - - End Footnote- - - - - -

For all these reasons, therefore, it would be inappropriate to recognize a Bivens remedy with respect to Tonn's claim that the individual defendants violated his Fifth Amendment due process rights.

In summery, the substance of the Complaint reveals that Tonn believes the defendants acted improperly during the course of the IRS'S investigation into the Partnerships and related entities. If the allegations contained in the Complaint are true (as they are assumed to for purposes of this motion), the individual defendants failed to afford Tonn the respect he deserved as a taxpayer and representative of the Partnerships. That being said, however, improper treatment by IRS

employees is not, in light of the Code's detailed and comprehensive remedial scheme, a sufficient basis upon which to extend a Bivens cause of action to Tonn's due process claims in Count IV. Accordingly, Tonn's claims against the individual defendants in Count IV of the Complaint will be dismissed.

D. Qualified Immunity

Even if it was appropriate to recognize a Bivens action in this case, all of the individual defenants would be immune from liability for any violation of Tonn's procedural or substantive *18 due process rights under the doctrine of qualified immunity. A public official id entitled to immunity when his or her conduct is objectively reasonable as measured by reference to law clearly established at the time of the incident in question. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102

S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Initially, a plaintiff must show that a law is "clearly established," i.e., a plaintiff must make a particularized showing that a "reasonable official" would understand that what he is doing violated one of plaintiff's constitutional rights. Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) ("the contours of the right must be sufficiently clear that a reasonable offical would understand that what he is doing violates that right"). A government official cannot be held liable for a violation of "extremely abstract rights." Id. at 639, 107 S. Ct. at 3039. The cases cited in the Court's discussion of Tonn's Bivens claim demonstrate, at the very least, that the actions alleged in Count IV, see supra, note 11, did not violate a right to due

process (procedural or substantive) that is clearly established. See Maraziti v. First Interstate Bank, 953 F.2d 520, 523 (9th Cir. 1992); Yalkut v. Gemignani, 873 F.2d 31, 35-36 (2d Cir. 1989); see also Wages, 915 F.2d at 1235; Gonsalves v. I.R.S., 791 F. Supp. 19, 23 (D. Me. 1992), aff'd, 986 F.2d 1407 (1st Cir. 1993) (table) (same). Accordingly, Tonn would be precluded fom asserting his claims in Count IV against any of the individual *19 defendants._/27

- - - - - Footnote- - - - - - - -

n27 Viewing Tonn's allegations against defendant Forsberg under the proper Rule 12(b) (6) standard, Forsberg would also be entitled to absolute prosecutorial immunity for any actions relating to the litigation in Wall. Butz v. Economou, 438 U.S. 478, 516-17, 98 S. Ct. 2894, 2916, 57 L.Ed.2d 895 (1978); Fry v.

pelaragno, 939 F.2d 832, 836-37 (discussing Butz)

- - - - - -End Footnote- - - - - -

Conclusion

Based upon the foregoing, and the records, files, and proceedings herein, including the briefs and arguments of counsel, **IT IS ORDERED** that the Defendants' Motion to Dismiss (Doc. No. 11) is **GRANTED.** Plaintiff's claims against the United States in Count I, II, and III are **DISMISSED WITHOUT PREJUDICE** and plaintiffs' claims against defendants Forsberg, Russell, Screaton and Wyssmann in count IV are **DISMISSED WITH PREJUDICE.**

LET JUDGEMENT BE ENTERED ACCORDINGLY.

Dated: November 30, 1993

/s/ Richard H. Kyle

RICHARD H. KYLE

United States District Judge

APPENDIX

Martin H. Tonn Civil Complaint

Plaintiff, Pro Se

U.S. District Court

District of Minnesota

Civil Action, File No.

3-93 Civil 385

Dated June 14, 1993

Pages A-45 - A-94

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil Action,
File Number 3-93 Civil 385
COMPLAINT CIVIL

DEMAND FOR JURY TRIAL

MARTIN H. TONN Pro Se,

Plaintiff,

v.

Forsberg,Jack
and
Russell, Donald G.
and
Screaton, Judith
and
Wyssmann, Joseph D.
Defendants

For his Complaint against Defendants, Martin Tonn (Tonn) states and alleges as follows:

THE PARTIES

1. Martin Tonn is a United States citizen residing in the State of Minnesota.

2. Defendants listed are/or have been employees of United States of America, Internal Revenue Service:

a. Jack Forsberg
Galtier Plaza, Box 90
175 5th Street, E.,Suite 650
St. Paul, Mn. 55101
and

b. Donald G. Russell
6040 Earle Brown Drive
Room 300; Group 1424
Brooklyn Center, Mn. 56430
and

c. Judith Screaton
No address available
and

d. Joseph Wyssmann
9770 Monroe St. NE
Blaine, Mn.

JURISDICTION

3. This Court has jurisdiction over this matter pursuant to 28 USC § 1331 (a).

4. Venue is proper under 28 USC § 1391 (b)(c) because the Plaintiff resides in the District of Minnesota.

BACKGROUND

5. During 1973 to 1983, Tonn and others designed, developed and manufactured prototype Alternative Energy (AE) equipment. The AE equipment was designed to use exclusively alternative energy fuel

sources (surplus agricultural crops, agricultural residue and domestic and industrial waste as opposed to the conventional fossil fuels namely coal, oil and natural gas). The (AE) equipment produces (1) liquid fuel (Ethanol Alcohol), (2) heat, (3) hot water, (4) electricity (5) high protein mash which provides cattle feed for dairy and meat producing animals and (6) carbon dioxide for use in commercial markets and for greenhouse consumption. The energy production process involves only bio-mass conversion, is completely recyclable and has as its by-products non-polluting emissions such as carbon dioxide, heat, and water vapor.

6. During the period of 1981 to 1983 Tonn sold all of his interests in the prototype Alternative Energy (AE) equipment to the Laurington Corporation which was wholly owned by

Tonn.

7. In 1981, 1982, 1983 specific pieces of the (AE) equipment were sold to limited partnerships which were to demonstrate, market and/or operate the (AE) equipment. In addition the partnerships were to manufacture similar (AE) equipment for use in indvidual and commercial agricultural enterprises.

8. In 1983, the limited partners and others leased and then purchased a manufacturing facility, Interstate Energy Enterprises, Inc. (IEEI) , which manufactured (AE) equipment for sale and lease.

9. Early in 1985 the IRS began an audit of the limited partnerships and limited partners.During the course of the audit, the Defendants made false and erroneous statements to investors

asserting fraudulant actions by the Plaintiff (Tonn) with respect to the allocation of partnership funds. These statements to investors by IRS Revenue Agent Wyssmann (Wyssmann) maligned the character and credibility of Tonn in the eyes of his investors since Tonn had not taken any funds as promoter fees, salaries or wages. This reckless and unwarranted allegation by Wyssmann had no basis in fact. In view of subsequent IRS correspondence to CPA Milbrett it appears that Agent Wyssmann wanted to discredit the reputation of Tonn by any means whether fair or foul. Further, Appraiser Donald G. Russell and Agent Wyssmann, based their claims against the partners on erroneous calculations, flawed methodology, and misrepresentation of fact and of law. At no time was Tonn allowed to present his

position in detail or discuss the erroneous work product of the Defendants. Tonn and Randy Milbrett, the CPA for the Partnerships, made numerous requests to discuss the issues in detail but were refused an opportunity to do so. The effect of those actions by the Defendants was an interference with the Investors'/Partners' payments due the Partnerships and the amounts due Tonn from the sale of the (AE) equipment. The unsubstantiated, false and erroneous allegations of Wyssmann and Appraisers Jochum and Russell were disseminated within the Service as fact. Tonn was urged to, but would not, sign a waiver of closing conference documents to indicate agreement with Wyssmann's position, without being allowed an opportunity to see the IRS engineers' reports. Revenue Agent's comment, in

communication dated September 5, 1986, " It appears the likelihood of your agreeing at this level to the IRS valuation is very remote." In spite of this comment, Tonn was being asked to sign and agree to the IRS findings without being allowed to see what he was agreeing to.

10. This unwarranted behavior on the part of the Defendants had to be reported to the limited partners as part of the fiduciary duty of the tax matters partner. The result of Defendants' Russell and Wyssmann erroneous and unwarrented actions that were outside the scope of the Defendants' authority and responsibility was to stop the collection of partners' payments due the partnership until the IRS matter could be resolved. It should again be noted that Tonn was not allowed an

opportunity to see what the IRS positions were or what the IRS position were based on before the IRS seizure of Tonn's property began. It should also be noted that Tonn was finally allowed an opportunity to meet with the St. Paul Appeals office on December 3, 1992 a period of more than seven years after the beginning of the audit early in 1985 to discuss the promoter penalty issue. The result of the subsequent meeting and research by the St. Paul Appeals office was notification to Tonn by IRS letter dated March 29, 1993 that all penalties were abated in full. This notification of abatement in full was received eight years after the beginning of the audit and six years after the IRS seizure of property in which Tonn had an interest. The stalling tactics and unresponsive attitude of

the Defendants clearly deprived Tonn of his Fifth Amendment Constitutional Rights of Due Process resulting in his loss of property.

11. Because of the inability to collect Patners' funds due the Partnerships, Interstate Energy Enterprises,Inc. (IEEI) the manufacturing entity of the Partnerships, was forced to file for Chapter 11 Bankruptcy protection from the United States Bankruptcy Court, Eastern District, Wisconsin on March 11, 1986. Throughout 1986 the requests by Tonn for information regarding the IRS audit findings were disregarded by the Defendants.

12. In March of 1987, the Chapter 11 Protection of IEEI, was dismissed by the Bankruptcy Court, on motion by the IRS for unpaid withholding taxes. The IRS then levied against and seized all assets of IEEI. The seizure included

records, inventory and financial data of IEEI, the Partnerships and Tonn, which were all turned over to secured creditors. This action by the IRS caused the total demise of IEEI which had employed between 50 and 60 employees. In meetings at IRS offices in Green Bay, Wisconsin, Mr. Isselmann, the controller of IEEI, and Mr. Tonn attempted to delay the closing of the Kiel plant until the Patnership matters could be discussed and settled but all to no avail. A Wisconsin Department of Development block grant had been approved along with commitment letters from the major secured creditors to fund the ongoing operations of IEEI. The only item holding up the block grant was the infusion of cash from Partners which was being held up by the stalling tactics of the Defendants and the refusal of the Defendants to inform the Partners

of the allegations and issues being raised.

13. In May of 1987, two months after the closing of IEEI, and two years after inception of the audit, Tonn was permitted to see the IRS appraisal and the revenue agent's reports which contained much of the erroneous and fraudulent information which had been compiled by the Defendants during the appraisal and investigative phase of the audit. The flawed methodology used by Defendant Russell during the appraisal process was addressed by Tonn as the Tax Matters Partner at the July 20, 1989 Appeals Conference. In a subsequent IRS internal office memo addressed to the IRS Appeals Officer Screaton dated October 2, 1989, IRS Valuation Engineer Don Russell attempted to cover up for his errors by blaming the Partnership CPA Milbrett for Russell's own erroneous

work product. The fact remains that IRS Appraiser Russell had formulated his position 2 years prior to the related work done by CPA Milbrett. This fraudulent exercise by Defendant Russell illustrates the mental attitude employed to discredit Tonn, CPA Milbrett, the Partners and to mislead Russell's own IRS superiors and co-workers.

14. In correspondence dated April 21, 1989, to the Limited Partners, Defendant Judith Screaton suggested legal action by the Limited Partners against Tonn. This was done without offering Tonn an opportunity to discuss in detail the fact that the IRS had not raised a single legitimate issue. The Defendants completely disregarded the work that had been done and was being done by the Partnerships to start an alternative energy industry in the United States to lessen the country's

dependence on foreign fuel sources, create a market for U.S. surplus grains, reduce pollution by processing industrial and domestic waste into usable energy, and provide employment for many workers. This action, against Tonn, by Appeals Officer Screaton was indicative of the ongoing effort on the part of the Defendants to divert the Partners attention away from the shoddy research and erroneous issues being raised by the Defendants. By suggesting legal action against Tonn, Defendant Screaton was attacking the character and credibility of Tonn without allowing Tonn an opportunity to defend his position on the erroneous allegations raised by the Defendants. Under color of law, Defendant Screaton clearly intended to deprive Tonn of his Fifth Amendment Constitutional Rights of Due Process of Law by raising erroneous

issues and attempting to put Tonn out of business by the unwarranted interference with the contractual relationship between Tonn and the Partnerships.

15. CPA Milbrett informed the IRS of the partnerships' intent to appeal the findings of the IRS audit. The first appeals conference was held July 20, 1989. The result of this conference was that Defendant Screaton raised a new and alternative issue "not for profit intent," to which the partnerships had not been given an opportunity to properly prepare and respond. Since this was a new allegation raised during the July 20,1989 Appeals Conference, Defendant Screaton was switching to a moving target approach attempting to wear down the will of the Partners by the raising of alternative issues not previously addressed by the Appraisers or Revenue

Agent Wyssmann.

16. A Second appeals conference was scheduled for November 15, 1989 for which the Partners had prepared a defense. The result of the second conference was that Defendant Screaton informed the Partnerships at the meeting that her mind was made up and her position was firm. Further, Defendant Screaton went on to state that "she had been instructed by the IRS attorneys that even if the IRS didn't presently have a case, alternative issues would be raised at the trial." Defendant Screaton went on to state that her only purpose at the conference was to determine the tenability of the IRS case. As in all previous meetings, correspondence, and conferences, the partners were not permitted an opportunity to present and discuss their position on the issues in detail.

17. On December 20, 1988 Henry A. and Lavina Wall (Wall) as limited partners in Independent Energy Systems-I, petitioned the U.S. Tax Court for a redetermination of taxes due as determined by the IRS. On February 28, 1990 Wall was notified by letter from IRS District Counsel attorney, Jack Forsberg that the Wall case was scheduled for April 30, 1990, Docket No. 32788-88S.

18. On March 2, 1990 Wall entered into an agreement to have U of Minnesota law students assist Wall in the upcoming court case. On March 8, 1990, student Chris Grewel talked with Jack Forsberg, the IRS attorney, to determine which issues would be considered for trial in the Wall case.

19. In a telephone call from Henry Wall on March 15, 1990, Tonn was told

of a telephone call from the U of Minnesota students indicating that they were dropping out of the Wall case. Tonn in route from Kiel, Wisconsin on March 15, 1990 received and called U of M supervisor Sedo to determine their reason for dropping out. Tonn was told that in a telephone call to Jack Forsberg by the students, Mr. Forsberg stated that "the students should not get involved with the Wall case because it was too complicated for the students." These actions by Defendant Forsberg indicated a willful interference between Wall and his legal representation.

20. Wall was officially notified by letter from U of M students dated March 16, 1990 confirming to Wall that the students were dropping the case. This action by the students and later insistence by Forsberg for Wall to obtain

legal representation other than "Tonn who doesn't know what he is talking about" illustrated willful and unwarranted manipulation by Defendant Forsberg coercing Wall into retaining other legal counsel which resulted in increased costs incurred in defending himself against the false evidence being raised by the Defendant.

21. On March 23 and March 28, 1990 Tonn, Wall and others including Harold Theiste, a limited partner and Dick Oberle, a tax advisor for Theiste and other limited partners, met with IRS attorney Jack Forsberg to inquire about IRS positions in this matter since Forsberg had advised the U of M students that the case was too complicated for the U of M law students. (It should be noted that neither Wall nor the partnerships had been previously notified of the issues to prepare for trial

scheduled for April 30, 1990.) During March 23 and March 28, 1990 meetings, IRS attorney Forsberg alluded to issues which might be brought up for trial April 30, 1990. It was requested of Forsberg to state in writing what the issues would be so that Wall could prepare for trial. It seems that attorney Forsberg was not acting in good faith by telling the students that the issues were too complicated for students but telling Wall at subsequent meetings that he, Forsberg, would not or could not identify which issues would be raised at the April 30th trial which would have made it possible for Wall to make preparation for the trial. Defendant Forsberg, by continuing this course of conduct, was harassing Mr. Wall by attempting to mislead Wall into believing that the IRS had legitimate

grounds for their actions when in fact Forsberg was fully aware that allegations raised by the Defendants were baseless. It appeared that the Defendants were using a generic check list to raise new and alternative issues hoping to find something in which they might have viability in prosecuting this case.

22. On April 9, 1990 in a meeting with IRS attorney Jack Forsberg, Wall, Tonn, Harold Theiste, (a limited partner and officer in the General Partner) and Layton Kinney (a limited partner) were handed copies of a letter from Forsberg to Wall dated April 6, 1990 detailing what possible issues might be scheduled for the trial scheduled for April 30, 1990.

23. During the April 9, 1990 meeting, Tonn, after reviewing a copy of the Forsberg letter to Wall stated

that Forsberg "was relying on incorrect sections of the IRS Code when referring to investment credits and Code sections referring to eligible energy credits." To this Forsberg replied that he (Tonn) did not know what he was talking about, and that he (Tonn) was not qualified to speak on these issues. Forsberg then addressed Wall, Kinney and Theiste and recommended that they not rely on Tonn's experience or expertise since he (Tonn) was "no better as a tax advisor than he (Tonn) was a securities advisor." It should be noted that Defendant Forsberg was acting outside the scope of his authority, without privilege, without any justification in fact and was clearly intending to discredit Tonn and harm the relationship of Tonn with his investors. At that time Tonn handed Forsberg a tax research item which

documented Tonn's position. Forsberg then left the meeting to check the Code and returned to state," more research was needed." It should be noted that at no time had Tonn represented himself as either a tax or securities advisor. This posturing by Defendant Forsberg clearly had the intent to discredit Tonn in the eyes of his investors/partners knowing that without the support of the Partners, Tonn's continuing effort in the energy industry would be hampered to the point where Tonn would be put out of business, thereby hindering the effectiveness of Tonn in assisting the Partners and Partnership in the preparation of their defense against the IRS.

24. In Wall vs. Commissioner, Docket No. 32788-88S, IRS attorney Forsberg in his Respondent"s Brief in

Answer, (a) relied on cited court cases in which the Petitioners lost because the Petitioner did not cite authority and not on the merits of the case, and (b) based his case on eligibility for energy credit on the improper paragraph of IRC Section 48 and, (c) took out of context and misstated and misrepresented cited court opinions to support the IRS position on the "original use issue" when in fact the cited court opinion Indian Creek Lumber Co. vs. CIR clearly supported the petitioners in the Wall vs. Commissioner case. This behavior of Defendant Forsberg demonstrates his ongoing effort to discredit Tonn and the Partners. Defendant Attorney Forsberg, by maintaining his arrogant demeanor in blatantly misrepresenting fact and law in addition to refusing

to discuss the erroneous allegations of the Defendants has succeeded in perpetrating a fraud both upon the U.S. Tax Court and on the Taxpayers/Partners.

25. Defendants Screaton and Jack Forsberg, by holding the threat of costly litigation over the investors/partners, attempted to coerce settlement agreements unfavorable to the partners all the while refusing to discuss in detail the issues which were baseless. The entire matter could have been put to rest at the inception of the audit/investigation had the partnerships been allowed to present their positions on the issues raised by the Defendants.

26. In 1992 Plaintiff Tonn filed an action with the U.S. Court of Claims in Washington D.C. regarding penalties imposed because of an alleged abusive tax shelter issue filed against promoter

Tonn. Tonn filed the action in strict compliance with the instructions of the St.Paul Appeals office. The action was dismissed by the U.S. Claims Court on Motion of the U.S. Department of Justice citing lack of Jurisdiction. Tonn, as a last resort, then turned to the offices of U.S. Senator Wellstone asking him to review the conflicting IRS documents which had been received by Tonn. The IRS then reconsidered their case and granted Tonn an appointment to discuss the case and by phone on March 3, 1993 informed Tonn that all penalties against Tonn for periods 1982 and 1983 were "abated in full."

27. Defendant Attorney Jack Forsberg in his Respondent's Brief in Answer raised an alternative issue, namely "whether the recovery allowance,

investment credits, and energy credits claimed for 1982 with respect to the equipment acquired by IES-I should be disallowed because the equipment was not placed in service during the taxable year." This alternate issue, was a direct contradiction of the position Forsberg had previously taken on the primary issue namely "whether the "original use" of the equipment acquired by IES-I commenced with the partnership for purposes of determining whether the equipment constitutes....(2) "used section 38 property" subject to the limitations of I. R. C. § 48(c)(2)(A) and (D)." To further confuse the issue, Defendant Forsberg in his Respondent's Brief in Answer requested that the Court make the following additional findings of fact: which are in essence, "that all of the components of the on farm

energy plant prototype acquired by IES-I were operational. Some of the components were operational considerably sooner." Forsberg then goes on to his argument, misquotes and takes out of context the cited court opinion in Indian Creek Lumber vs. CIR TC Memo 1982-146 to indicate support for the IRS position when in fact the cited court opinion clearly supports the petitioners position in the Wall vs. CIR case. Defendant Forsberg, by this action of clever word manipulation, clearly attempted to cover his own tracks and the tracks of the co-defendants by deliberately misleading the Court with this effort.

28. On December 13, 1991 the U.S. Tax Court rendered a Memorandum Opinion which in effect said, "the equipment was not placed in service in 1982 and therefore is not entitled to claim energy

credits or claim depreciation for 1982." This Tax Court Opinion has its basis in the alternative issue raised by Forsberg , which was clearly contradicted by Forsberg's own Respondent's Brief in Answer in the Wall vs. CIR case. The contradictory effort by Defendant Forsberg to confuse the Court and the Partners legal counsel is indicative of the frivolous and malicious nature of the Defendants' ongoing prosecution of their action against Tonn and the Partnerships. A Motion for Reconsideration of the Memorandum Opinion (MO) was filed on Fedruary 25, 1992 and was granted on March 4, 1992. On June 8, 1992 a Supplementary Memorandum Opinion (SMO) was rendered by the Tax Court reaffirming the "In service" opinion but for wholly different reasoning namely "that the equipment

could not be considered as placed in service because a trade or business did not exist." A Motion for Reconsideration of the Supplemental Memorandum Opinion was filed on July 10, 1992. No word on the disposition of the Motion for Reconsideration had been received until approximately December 13, 1992 when Tonn called the Tax Court to inquire as to what had been decided on the Motion for Reconsideration. At that time the Tax Court clerk informed Tonn that the Motion for Reconsideration had been denied on July 14, 1992. Since the time for timely filing of appeals had expired, no further filings would be considered in the Wall case. It should be noted that the Supplemental Memorandum Opinion was in effect based on "what level or type of activity" constitutes carrying

on a trade or business. Since the Supplemental Memorandum Opinion regarding this new issue was raised sua sponte by the court, the petitioners in the Wall case were not given adequate opportunity to respond to the new or revised version of the alternative issue of "not being placed in service." It should also be noted that in no instance did the record support the SMO findings of the Court nor did the Court give any consideration or credence to the evidence presented by the petitioners, the trial testimony or the affidavits submitted on behalf of the petitioners' position. In subsequent meetings Defendant Forsberg informed the petitioners' attorney that since the Judge had issued two opinions unfavorable to the petitioner's position it was apparent that the petitioners had little

chance of success in their efforts and it would seem advisable that the investors/partners should settle on the terms proposed by the IRS.

In summary it should be noted that the petitioners were not allowed to present their position in detail but were coerced into an unfavorable settlement under the threat of costly litigation should the matter go to trial. It seems inconceivable that the tax court would rule that a business did not exist in view of the fact that the IRS closed down the manufacturing entity of the partnerships for failure to pay withholding taxes thereby closing a facility and business which had existed for almost 4 years and was employing between 50 and 60 workers. This ongoing course of conduct by the Defendants in pursuing this case based on erroneous

allegations, misrepresentation of fact and misrepresentation of law, has clearly revealed that it has been the intention of the Defendants to systematically wear down Tonn and the Partners to the point where they would settle at any cost. Further, in pursuing this reckless and frivolous course of conduct, the Defendants have succeeded in depriving Tonn of his Fifth Amendment Constitutional Rights, namely that of Due Process of Law and have caused him considerable loss of property and business.

COUNT I

FRAUD

29 Tonn realleges paragraphs 1-28 above, inclusive.

30. During June of 1985, defendant Wyssmann made fraudulent representations

to Investors/Partners that Tonn was engaged in misappropriation of the partnerships' funds for personal purposes. (Refer to CPA Milbrett letter to Wyssmann dated June 21, 1985, and IRS Supervisor letter to Milbrett dated June 24, 1985.) This action by Defendant Wyssmann, unsupported by fact, reckless and malicious in nature was clearly intended to divide and conquer thereby destroying the relationship between Tonn, the Partnerships and the Investor/Partners who had invested in alternative energy equipment.

31. During 1985, Defendant Wyssmann made representations to Investors/ Partners that credits relating to (AE) equipment, which partners had taken as deductions on their income tax, would not be allowed. This action was taken before any appraisals or any meaningful

investigation had been made by the Defendants, or Tonn as Tax Matters Partner had been notified or had an opportunity to defend himself and the Partnerships against these fraudulent allegations.

32. During the period 1986 through 1990 Defendant Russell in his original appraisal, Defendant Screaton by refusing to acknowledge statements by Greg Wieweck, and Defendant Forsberg by his submission of Respondent's Expert Witness Report fraudulently misrepresented their own comparable example of Fair Market Valuation comparison, understated at ratio of 20 to 1, when in fact the actual Fair Market Valuation of the Wieweck equipment clearly supported the value of the equipment purchased by the Partnerships.

33. The IRS Valuation Engineer

Russell, by placing the blame for his own erroneous work product on the partnership CPA, (internal office memo dated October 2, 1989) fraudulently attempted to deceive both his own IRS superiors and co-workers and defame the credibility of Tonn and others involved in the Alternative Energy Systems.

34. The IRS attorney Forsberg by his submission to the Court in the Respondent's Brief in Answer, fraudulently took out of context and misrepresented the Indian Creek Lumber Company vs CIR court opinion when in fact the Indian Creek court opinion clearly supported the position of the Petitioners in Wall vs. Commissioner as stated in paragraphs 24 and 27 of this complaint. The ongoing course of conduct by Forsberg displayed a

reckless disregard for truth to mislead the Court which in itself is wrongful but in addition was done with the malicious intent to injure Tonn and his investors.

COUNT II

MISREPRESENTATION OF FACT

35. Tonn realleges paragraphs 1-34 inclusive.

36. Defendant Don Russell calculated his income approach valuation of equipment using an after tax valuation when valuing the income derived from equipment and a before tax income approach (original Russell Audit dated March 4, 1987) when comparing the income from government securities. When confronted with the erroneous nature of his methodology at the Appeals Conference on July 20, 1989, Russell in a subsequent internal IRS memo

attempted to cover-up his own shoddy work product and shift the blame to CPA Milbrett constituted a clear attempt by Defendant Russell to deceive his own supervisors and co-workers at the IRS further discrediting the work of Tonn and the Partners. Appeals Officer Screaton, in an attempt to gloss over the erroneous work product of Appraiser Russell in effect stated, "even if there were problems with the IRS audit/ appraisal, alternative issues would be raised at the trial." The attitude displayed by Defendant Screaton at the Appeals Conference and by correspondence clearly indicated her contempt for the efforts of Tonn and the Partners in their own defense and repeatedly dismissed these efforts as not being significant and as "self-serving" responses.

37. In his initial appraisal, Defandant Don Russell added 6% to an interest rate of 12% of a government security to reflect the risk free nature of a government security. In reality the Federal Reserve lists fixed income government securities with a built in risk factor of an average negative 2% annual rate of return caused by reduced purchasing power of government securities having been affected by inflation.

38. Both IRS Appraiser Jochum and Defendant Russell listed equipment as a market comparable, in their own example, of a value of $4,200 arrived at arbitrarily by the IRS when in fact the (Wieweck) equipment was sold for $100,000 a ratio understatement of 20 to 1. The ongoing attempt by the named Defendants to discredit Tonn and the Partners appears to have had its

beginning in the erroneous conclusions arrived at (in the IRS comparable Wieweck example) by Appraiser Jochum in 1985. This reckless and malicious attempt by Jochum to fabricate justification for her allegations against Tonn referred to a misleading magazine article, inserted faulty reasoning into the process and went on to advance the resultant conclusion as fact. In 1986 Defendant Russell picked up on this opportunity to demonstrate his own expertise and went on to elaborate further without attempt to investigate the veracity of the allegation. During the 1989 Appeals Conference communication with Appeals Officer Screaton, Tonn presented written documentation from Wieweck disputing the conclusions reached by the IRS Appraisers. Defendant Screaton dismissed the documentation

presented out of hand as being "self-serving." This action by Screaton again showed that the Defendants were conducting an action against Tonn to deprive him of his Constitutional Rights of Due Process by refusing to review and consider the documentation presented by Tonn and the Partners in their defense. At the November 15, 1989 Defendant Screaton informed the Partnerships at the meeting that "her mind was made up and her position was firm, also that, the attorneys had instructed her that alternative issues would be raised in the event that the original charges brought were successfully disputed." When questioned about her impartiality as an Appeals Officer, Screaton replied,"I am being paid to be partial and the IRS signs my paycheck so my duty is to the

Service."On April 13, 1990 Defendant Forsberg submitted to the Tax Court, in the Wall case,"Respondents Expert Witness report" which again contained the reference to IRS Wieweck example. This continued harassment and persistence in bringing these false accusations against Tonn and the Partners constitutes misrepresentation of fact and clearly illustrates the Defendants' intent to mislead the Court and deprive Tonn and the Partners of their Right of Due Process in this action.

COUNT III

DEFAMATION

39. Tonn realleges paragraphs 1-38 inclusive.

40. Defendant Wyssmann, during his investigation in 1985 was making false statements to Investors/Limited Partners that Tonn was using partnership

funds for his own personal use. (Refer to CPA letter to Wyssmann dated June 21, 1985 and reply by Supervisor Pederson dated June 24, 1985.) The fact in this situation was that Tonn had not taken any funds, nor had he taken any wages or salaries but had left all of monies which were due Tonn, to be retained in the business, which was to help in the success of the alternative energy venture.

41. On April 9, 1990 a meeting was held with Defendant Forsberg to identify the issues which would be raised by the IRS against the Petitioners in the Wall vs. Commissioner Docket No 32788-88S. Participants in the meeting in addition to Henry Wall were Martin Tonn, the Partnership's Tax Matters Partner and Secretary of the General Partner, Independent Energy Systems

Inc., (IESI), Harold Theiste, a Limited Partner and President of the General Partner IESI and Layton Kinney, a Limited Partner. At the outset of the meeting, Defendant Forsberg handed copies of a letter to Wall dated April 6, 1990 indentifying what issues might be raised by the IRS at the trial on April 30, 1990. Copies of the Forsberg to Wall letter were given to all participants at the meeting. Commenting on the letter, Tonn said to Forsberg, "it appears you are basing your argument for investment credits and energy credits on the wrong section of the Code."In the presence of the other investors, Defendant Forsberg replied to Tonn, (1) "you don't know what you are talking about" (2) "you are not qualified to speak on these issues" and (3) turning to the other participants at the meeting

in effect said, " I recommend that you get someone else to advise you since Tonn doesn't know what he is talking about. He doesn't know any more about tax law than he does about securities law." At no time had Tonn represented himself as a securities attorney, tax expert or any other kind of adviser. Mr. Forsberg had no justification, submitted no rationale, or basis for his railing against Tonn. This entire course of conduct against Tonn was without privilege and was done for the improper motive to divide and conquer by discrediting Tonn in the eyes of his investors and divert attention away from the erroneous allegations of the Defendants.

42. Defendant Screaton, by correspondence dated April 21, 1989, suggested legal action by the Partners

against (the promoter) Tonn. It seems this suggestion was made as a foregone conclusion that Tonn must be guilty of something and therefore legal action by the Partners was probably imminent.

43. The false statements were made by Defendants Wyssmann, Screaton and Forsberg acting under color of law without any factual basis to support such allegations. The Defendants intentionally disseminated falsehoods about Tonn to others and as a direct and proximate result the investors refused to fulfill their investment responsibilities and obligations to the partnerships and Tonn. As a further direct and proximate result of the Defendants' misrepresentations, IEEI was unable to fulfill its obligations and therefore was required to file for protection under the United States

Bankruptcy Code and ultimately lost this protection by IRS motion for dismissal and IEEI was forced to close its doors, thereby causing damages to Tonn in an amount to be determined at trial.

COUNT IV

DEPRIVATION OF FIFTH AMENDMENTT CONSTITUTIONAL RIGHTS OF DUE PROCESS

44. Tonn realleges paragraphs 1-43, inclusive.

45. The following listed actions by named and unnamed Defendants have deprived Tonn of his Constitutional Rights of due process. The actions include:

(a) False and erroneous statements made to investors asserting fraudulent actions by the Plaintiff with respect to allocation of funds within the partnerships.

(b) Failure to provide a timely notice to the Plaintiff Tonn of false and erroneous allegations being made to the investors by the defendants, depriving Tonn the right to protect and defend himself, his property, and his business.

(c) Failure to provide a neutral decision maker to rule on the veracity of the allegations before these actions were taken.

(d) Denial of Plaintiff's request for an opportunity to make a detailed oral presentation to the Defendants during the fact finding portion of the investigation or the partnership appeals conferences.

(e) Denial of Plaintiff's opportunity during the audit, the appeals process, and/or the litigation process, to present evidence regarding the issues or

witnesses to the investigative personnel or decision making agents regarding the allegations made against the Plaintiff, Tonn. (f) Since Tonn was not informed of the allegations being made against him,the result was that no opportunity was afforded the Plaintiff to be represented by an attorney to make the presentation in defense of the false IRS allegations before levying and seizing Tonn's property.

46. Tonn alleges that the named Defendants arrogantly and recklessly deprived Tonn of all elements of due process of law resulting in the Tonn loss of property.

47. Tonn further alleges that despite numerous requests over a period of 8 years, the Defendants had refused to (a) adequately identify issues of concern, (b) discuss the issues and

(c) refused to grant Tonn the opportunity to present his position on the findings of the Defendants.

48. Based on the information as listed in this Complaint,it is the belief of Tonn that the whole course of conduct of named and unnamed Defendants under color of law in this Complaint has been to knowingly deprive Tonn of his Civil Rights. To the best of his knowledge and belief, Tonn adds that this was done to cover-up their erroneous activity and to prevent embarrassment to the Defendants for the quality of the work performed during the audit, the trial and subsequent actions.

49. Tonn hereby repeats his demand for jury trial.

Wherefore,Tonn, demands judgement against Defendants as follows:

1. Damages against Defendants

in an amount to be determined at trial, including any lost profits Tonn has incurred or will incur.

2. For actual costs and disbursements incurred by Tonn in pursuing this action, together with reasonable attorney's fees.

3. Such other and further relief as the Court may deem just and equitable, or to which Tonn may be entitled by operation of law based upon the facts to be presented at trial.

Dated this 14th day of June,1993

Signed /s/Martin H. Tonn, Pro Se

Plaintiff
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